

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

WILLIAM P. CASTILLO,

Case No. 2:04-cv-00868-RCJ-EJY

Petitioner,

ORDER

V.

WILLIAM REUBART, *et al.*,

Respondents.

I. Summary

In this capital habeas corpus action, on January 14, 2019, this Court denied William P. Castillo's habeas petition and granted a certificate of appealability, and judgment was entered accordingly (ECF Nos. 231, 232). On September 16, 2019, this Court partially granted Castillo's motion to alter or amend judgment and expanded the certificate of appealability (ECF Nos. 246, 247). Castillo appealed (ECF Nos. 234, 248).

On January 13, 2021, the Ninth Circuit Court of Appeals granted Castillo's unopposed motion for a stay and limited remand and remanded the case to this Court. See Order of Court of Appeals filed January 13, 2021 (ECF No. 251). The court of appeals ordered:

On limited remand, the District Court will reconsider its relation back order, and its disposition of those claims, in light of intervening law. See Dist Ct 3/02/2016 Order (Dist Ct DE 184); see *Ross v. Williams*, 950 F.3d 1160 (9th Cir. 2020) (en banc).

Id. at 1

Therefore, on January 25, 2021, this Court set a schedule for the parties to file briefing on the limited remand. See Order entered January 25, 2021 (ECF No. 252).

1 The Court ordered that its review of this case on this limited remand would be limited to
2 the issue identified by the court of appeals: the effect of intervening law on this Court's
3 rulings in the order entered March 2, 2016 (ECF No. 184) regarding whether certain
4 claims in Castillo's second amended habeas petition relate back to his original petition
5 for purposes of the application of the statute of limitations. *Id.*

6 Castillo filed his opening brief on remand on May 25, 2021 (ECF No. 255).
7 Respondents filed their answering brief on remand on June 23, 2022 (ECF No. 269).
8 Castillo did not file a reply brief. See Order entered January 25, 2021 (ECF No. 252) (30
9 days to file reply brief).

10 In his opening brief on remand, Castillo argues that the Court should reconsider
11 its ruling that Claims 1(II)(A), 1(II)(B), 3(I)(B), 3(I)(C), 3(II)(B), 4, 5, 17 and 19 of his
12 second amended petition do not relate back to his original petition for purposes of
13 application of the statute of limitations, and he argues that the Court should reconsider
14 its ruling that Claims 1(II)(A), 1(II)(B), 3(I)(C), 3(II)(B), 4 and 5 are barred under the
15 procedural default doctrine. See Opening Brief on Remand (ECF No. 255).

16 The Court determines that *Ross v. Williams*, 950 F.3d 1160 (9th Cir.) (en banc),
17 *cert. denied sub nom. Daniels v. Ross*, 141 S. Ct. 840 (2020), does not change its prior
18 conclusions that none of Claims 1(II)(A), 1(II)(B), 3(I)(B), 3(I)(C), 3(II)(B), 4, 5, or 17
19 relates back, or its conclusion regarding the extent to which the cumulative error claim
20 in Claim 19 is barred by the statute of limitations, and the Court declines to reconsider
21 its rulings regarding the procedural default of Claims 1(II)(A), 1(II)(B), 3(I)(C), 3(II)(B), 4
22 and 5.

23 II. Discussion

24 A. Relation Back - Legal Principles - Ross

25 In the March 2, 2016, order resolving Respondents' motion to dismiss, the Court
26 explained the background of the statute of limitations issue, and the reason the issue
27 arises, as follows:

Under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), there is a one-year statute of limitations applicable to federal habeas corpus petitions. The statute provides:

- (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
 - (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
 - (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
 - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1)(A-D).

The petitioner is entitled to statutory tolling of the limitations period while a “properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2).

* * *

Castillo’s conviction became final on March 22, 1999, when the United States Supreme Court denied his petition for a writ of certiorari. See *Castillo v. Nevada*, 526 U.S. 1031 (1999); Letter Regarding Denial of Petition for Writ of Certiorari, Respondents’ Exhibit 129. The one-year limitations period for Castillo’s federal habeas petition began running on that date.

Castillo filed his first state habeas petition eleven days later, on April 2, 1999. There is no question that Castillo’s first state habeas action was “properly filed,” such that it tolled the limitations period, under 28 U.S.C. § 2244(d)(2), after only eleven days ran against the limitations period. Castillo’s first state habeas action was concluded, and the statutory tolling ended, when the Nevada Supreme Court issued its

1 remittitur on October 27, 2004, after affirming the denial of relief in
 2 Castillo's action. See Remittitur, Respondents' Exhibit 211. The running of
 3 the limitations period resumed on that date.

4 Therefore, without any equitable tolling, the one-year limitations
 5 period ran out 354 days later, on October 16, 2005.

6 Castillo mailed his original *pro se* habeas petition to this court for
 7 filing on June 22, 2004, before the Nevada Supreme Court issued its
 8 remittitur, concluding Castillo's first state habeas action. See Petition for
 9 Writ of Habeas Corpus (ECF No. 1). Under the "mailbox rule," the court
 10 considers the petition to have been filed on that date. See *Houston v.*
Lack, 487 U.S. 266, 276 (1988); Rule 3(d) of the Rules Governing Section
 11 2254 Cases in the United States District Courts. Castillo's original petition
 12 in this action was unquestionably timely-filed.

13 However, without equitable tolling, Castillo's first amended petition,
 14 and his second amended petition, were untimely. The pendency of
 15 Castillo's federal habeas action did not toll the limitations period. See
Duncan v. Walker, 533 U.S. 167, 181–82 (2001) (no tolling for the
 16 pendency of a federal habeas petition). Castillo's first amended petition
 17 was filed on December 15, 2008, which was 1156 days—3 years, 1
 18 month, and 29 days—after the limitations period expired. See First
 19 Amended Petition (ECF No. 70). Castillo's second amended petition was
 20 filed on May 19, 2014, which was 3137 days—8 years, 7 months, and 3
 21 days—after the limitations period expired. See Second Amended Petition
 22 (ECF No. 126).

23 * * *

24 The question of the timeliness of the claims asserted in Castillo's
 25 second amended petition turns on whether those claims relate back to the
 26 filing of Castillo's original petition.

27 Order entered March 2, 2016 (ECF No. 184), pp. 12–14.

28 On remand, the Court is to reconsider the relation back issue order in light of the
 1 intervening decision of the court of appeals in *Ross*. See Order of Court of Appeals filed
 2 January 13, 2021 (ECF No. 251). Specifically, Castillo asks the Court to reconsider its
 3 relation back analysis with regard to Claims 1(II)(A), 1(II)(B), 3(I)(B), 3(I)(C), 3(II)(B),
 4, 5, 17 and 19 of his second amended petition. See Opening Brief on Remand
 (ECF No. 255).

5 In habeas cases, as in other civil cases, an amendment "relates back to the date
 6 of the original pleading when ... the amendment asserts a claim ... that arose out of the
 7 conduct, transaction, or occurrence set out—or attempted to be set out—in the original
 8 pleading...." Fed. R. Civ. P. 15(c)(1)(B). Even if the claim in the amended pleading

1 concerns the same trial and conviction as the original pleading, as is usually the case in
 2 habeas cases, the amendment does not relate back if it asserts a ground for relief
 3 supported by facts different from those set forth in the original pleading. *Mayle v. Felix*,
 4 545 U.S. 644, 650 (2005). In habeas cases, relation back depends on the “existence of
 5 a common ‘core of operative facts’ uniting the original and newly asserted claims.”
 6 *Mayle*, 545 U.S. at 659. A habeas claim does not share a core of operative fact with an
 7 earlier petition when it “asserts a new ground for relief supported by facts that differ in
 8 both time and type from those the original pleading set forth.” *Id.* at 649.

9 Therefore, the Court looks at the claims as pled in Castillo’s second amended
 10 petition and assesses whether the core operative facts asserted in support of those
 11 claims were set forth in Castillo’s original petition.

12 In *Ross*—the intervening authority that occasioned the remand—the court of
 13 appeals considered the question of relation back of an amended habeas petition to an
 14 original petition to which the petitioner had attached a state supreme court order. The
 15 court concluded that claims in the amended petition could relate back to the original
 16 petition, by virtue of facts included in the document appended to the original petition:

17 The foregoing authorities make plain that relation back is available
 18 under the circumstances presented here. If a petitioner attempts to set out
 19 habeas claims by identifying specific grounds for relief in an original
 20 petition and attaching a court decision that provides greater detail about
 21 the facts supporting those claims, that petition can support an amended
 22 petition’s relation back.

23 *Ross*, 950 F.3d at 1167 (footnote omitted). The court emphasized, however, that, to
 24 support relation back, facts included in the document appended to the original petition
 25 must relate to a ground for relief asserted in the original petition:

26 If an exhibit to the original petition includes facts unrelated to the grounds
 27 for relief asserted in that petition, those facts were not “attempted to be set
 28 out” in that petition and cannot form a basis for relation back.

29 *Id.* at 1168. The court reinforced this point as follows:

30 These commonsense procedures also dispose of any concern that
 31 petitioners could lay the groundwork for an endless host of claims
 32 unburdened by the statute of limitations merely by submitting a blank

1 petition and attaching a complete trial record or other voluminous filings.
2 Such a petitioner would have failed to set out any claims in her original
3 petition in the first place, and therefore could not incorporate
4 corresponding facts under the rule we explain here.

5 *Id.* at 1173; see also *id.* at 1172 n.17.

6 The court in *Ross* set forth a two-step analysis for assessing the issue of relation
7 back in such cases:

8 We follow two steps to determine whether an amended petition relates
9 back to an original petition that relied on an appended written instrument
10 to help set forth the facts on which it based its claims. First, we determine
11 what claims the amended petition alleges and what core facts underlie
12 those claims. Second, for each claim in the amended petition, we look to
13 the body of the original petition and its exhibits to see whether the original
14 petition “set out” or “attempted to ... set out” a corresponding factual
15 episode, see Fed. R. Civ. P. 15(c)(1)(B)—or whether the claim is instead
16 “supported by facts that differ in both time and type from those the original
17 pleading set forth,” *Mayle*, 545 U.S. at 650, 664, 125 S.Ct. 2562.

18 *Id.* at 1167.

19 B. Claim 1(II)(A)

20 In Claim 1(II)(A) of his second amended petition, Castillo claims that his federal
21 constitutional rights were violated because of ineffective assistance of counsel on
22 account of his trial counsel’s failure to investigate, identify, and present mitigating
23 evidence in the penalty phase of his trial. Second Amended Petition (ECF No. 126),
24 pp. 35–96.

25 In the March 2, 2016, order resolving Respondents’ motion to dismiss, this Court
26 ruled:

27 No claim with the same core of operative facts as this claim was raised in
28 Castillo’s briefing on his direct appeal or in his briefing on the appeal in his
first state habeas action, which briefing was incorporated into his original
petition in this action. See Respondents’ Exhibits 108, 111, 191, 197, and
198. Claim 1(II)(A) does not relate back to the filing of Castillo’s original
petition.

Order entered March 2, 2016 (ECF No. 184), p. 15.

In Castillo’s original petition, where the form called for him to state his grounds
for relief, Castillo stated:

1 I allege that my state court conviction and/or sentence are
 2 unconstitutional, in violation of my Constitutional Rights, by incorporating
 3 herein the Constitutional claims contained in Exhibits 1 through 4 attached
 4 hereto.

5 Petition for Writ of Habeas Corpus (ECF No. 1), pp. 2–3. Castillo attached five exhibits
 6 to his original petition:

- 7 Exhibit 1 - Nevada Supreme Court’s order affirming the denial of
 6 relief in Castillo’s first state habeas action (ECF No. 1,
 pp. 6–15);
- 8 Exhibit 2 - Castillo’s opening brief on his direct appeal (ECF
 7 No. 1, pp. 16–74);
- 9 Exhibit 3 - Castillo’s reply brief on his direct appeal (ECF No. 1,
 pp. 77–97);
- 10 Exhibit 4 - Castillo’s opening brief on the appeal in his first state
 9 habeas action (ECF No. 1, pp. 99–160);
- 11 Exhibit 5 - Castillo’s reply brief on the appeal in his first state
 12 habeas action (ECF No. 1, pp. 162–78).

13 *Id.* (ECF No. 1 at 6–178). In Exhibits 2 and 3, on his direct appeal, Castillo asserted the
 14 following claims:

- 15 1. It was error for the trial court to allow repeated and prejudicial
 16 reference to the booties knitted by the victim.
- 17 2. It was prejudicial error for the trial court to admit a photograph of
 18 the victim and her daughter and granddaughter at the trial.
- 19 3. The trial court should have granted the motion for mistrial after a
 20 state witness informed the jury that Castillo had another case.
- 21 4. Improper argument by the prosecution during the penalty hearing.
- 22 5. It was error to admit gruesome pictures taken at the autopsy.
- 23 6. Victim impact evidence should not have been admitted to the
 24 extent it was.
- 25 7. It was error to give an anti-sympathy instruction to the jury.
- 26 8. It was error for the trial court to refuse to instruct the jury on the
 27 defense theory of mitigating circumstances.

28 *Id.* (ECF No. 1 at 17, 22, 45–71, 79, 81–94). Exhibits 1, 4 and 5 reveal that on the
 appeal in his first state habeas action, Castillo asserted the following claims:

- 1 1. Ineffective assistance of counsel.
- 2 2. The prosecution presented improper argument during the penalty
3 hearing, and his appellate counsel was ineffective for not
 challenging that argument on Castillo's direct appeal.
- 4 3. A crowbar is not a deadly weapon.
- 5 4. Castillo received ineffective assistance of counsel because his trial
6 and appellate counsel failed to object to bad character evidence
 that was improperly presented to the jury in the penalty phase of
 the trial, and because they failed to challenge the jury instructions
 concerning the jury's consideration of such evidence.
- 8 5. Castillo received ineffective assistance of counsel because his trial
9 counsel failed to properly investigate his case and failed to present
 a defense in the guilt phase of the trial based upon "psychological
 difficulties" suffered by Castillo throughout his life.
- 11 6. Castillo's conviction is unconstitutional because of cumulative
 error.
- 12 7. The death penalty is cruel and unusual punishment.
- 13 8. Lethal injection is cruel and unusual punishment.
- 14 9. Castillo's conviction and sentence violate the international covenant
 on civil and political rights.
- 16 10. Nevada capital punishment system operates in an arbitrary and
 capricious manner.

17 *Id.* (ECF No. 1 at 9–15, 104–05, 124–57, 165–76).

18 Castillo did not, on either his direct appeal or the appeal in his first state habeas
19 action, assert a claim like that in Claim 1(II)(A), that is, a claim that his trial counsel was
20 ineffective for failure to investigate, identify, and present mitigating evidence in the
21 penalty phase of his trial. Therefore, in his original petition in this case, in which he
22 incorporated the claims asserted on his direct appeal and the appeal in his first state
23 habeas action—"I allege that my state court conviction and/or sentence are
24 unconstitutional, in violation of my Constitutional Rights, by incorporating herein the
25 Constitutional claims contained in Exhibits 1 through 4 attached hereto"—Castillo did
26 not assert any such claim.

27 Ross does not affect the Court's conclusion that Claim 1(II)(A) does not relate
28 back to Castillo's original petition. Ross made clear that, for relation back, facts found in

1 documents attached to, and incorporated into, an original petition must support a claim
2 asserted in that petition. See *Ross*, 950 F.3d at 1167 (“If a petitioner attempts to set out
3 habeas claims by identifying specific grounds for relief in an original petition and
4 attaching a court decision that provides greater detail about the facts supporting those
5 claims, that petition can support an amended petition’s relation back.” (emphasis
6 added)); *id.* at 1168 (“If an exhibit to the original petition includes facts unrelated to the
7 grounds for relief asserted in that petition, those facts were not ‘attempted to be set out’
8 in that petition and cannot form a basis for relation back.”); *see also id.* at 1172 n.17,
9 1173. It is not enough that the petitioner can cherry-pick, from documents attached to
10 an original petition, facts that arguably relate to a claim in the amended petition, but that
11 are were not related to a claim in the original petition. That is the case here. Castillo
12 points to facts mentioned in the documents attached to his original petition that can be
13 characterized as related to Claim 1(II)(A); but there was no claim at all like Claim 1(II)(A)
14 asserted in Castillo’s original petition and supported by those facts.

15 In his brief on remand, Castillo points out that in his opening brief on the appeal
16 in his first state habeas action, which was attached to his original petition in this case,
17 he asserted a generic claim of ineffective assistance of counsel, without setting forth
18 any facts supporting that claim in that section of the brief. See Opening Brief on
19 Remand (ECF No. 255), p. 9; Petition for Writ of Habeas Corpus (ECF No. 1 at 124).
20 However, the mere fact that there was a generic ineffective assistance of counsel claim
21 in Castillo’s initial petition, without any factual explanation, does not allow for relation
22 back of Claim 1(II)(A), which is a claim of ineffective assistance of trial counsel on
23 account of trial counsel’s alleged failure to investigate, identify, and present mitigating
24 evidence in the penalty phase of Castillo’s trial. See *Schneider v. McDaniel*, 674 F.3d
25 1144, 1152 (9th Cir. 2012) (holding that an original claim of ineffective assistance for
26 failure to present a particular defense did not allow relation back of later claim of
27 ineffective assistance for failure to present a different defense).

1 Castillo goes on to argue that, elsewhere in the opening brief on the appeal in his
2 state habeas action, Castillo mentioned counsel's failure to present "compelling
3 psychological evidence" See Opening Brief on Remand (ECF No. 255), pp. 9–10. That
4 comment, however, was made in support of Castillo's claim that his trial counsel was
5 ineffective for failing to present a defense in *the guilt phase of the trial* based upon
6 psychological difficulties" suffered by Castillo. See Petition for Writ of Habeas Corpus
7 (ECF No. 1 at 141–47). That's a far different claim from Claim 1(II)(A), and it was based
8 on a different set of core operative facts.

9 Castillo also argues that, in the Nevada Supreme Court decision in his state
10 habeas action, which was also attached to his original petition, the court summarized
11 Castillo's mitigation presentation and mentioned Castillo's history of institutionalization
12 and emotional disturbance. See Opening Brief on Remand (ECF No. 255), p. 10. But
13 none of those facts mentioned in that decision were related to any claim asserted by
14 Castillo. Again, simply cherry-picking factual statements out of a document attached to
15 an original petition, without relating those facts to a claim made in that case, does not
16 support relation back.

17 Castillo did not assert in his original petition a claim that his trial counsel was
18 ineffective for failing to investigate, identify, and present mitigating evidence in the
19 penalty phase of his trial, so there is no such claim in the original petition for Claim
20 1(II)(A) to relate back to, despite Castillo's identification of stray facts mentioned in the
21 documents attached to the original petition. Claim 1(II)(A) does not relate back. The
22 Court's conclusion in this regard is unaffected by *Ross*.

23 C. Claim 1(II)(B)

24 Claim 1(II)(B) is a claim that Castillo was denied his federal constitutional rights
25 because his trial counsel was ineffective in the penalty phase of his trial for failure to
26 object to improper vouching by witnesses. Second Amended Petition (ECF No. 126),
27 pp. 96–98. The claim concerns the testimony of prosecution witnesses Michael Eylar
28

1 and Paul Ehlers about Castillo's prior convictions, and trial counsel's alleged ineffective
2 performance in failing to object to that testimony. See *id.*

3 In the March 2, 2016, order resolving Respondents' motion to dismiss, this Court
4 ruled:

5 No claim with the same core of operative facts as this claim was raised in
6 Castillo's briefing on his direct appeal or in his briefing on the appeal in his
7 first state habeas action, which briefing was incorporated into his original
8 petition in this action. See Respondents' Exhibits 108, 111, 191, 197,
9 and 198. Claim 1(II)(B) does not relate back to the filing of Castillo's
original petition.

Order entered March 2, 2016 (ECF No. 184), p. 15.

Ross does not affect the Court's conclusion that this claim does not relate back to Castillo's original petition. Castillo did not, on either his direct appeal or the appeal in his first state habeas action, assert a claim like that in Claim 1(II)(B). Therefore, in his original petition in this case, in which he incorporated the claims asserted on his direct appeal and the appeal in his first state habeas action, Castillo did not assert any such claim.

Castillo argues that Claim 1(II)(B) relates back because, in his opening brief on the appeal in his state habeas action, which was attached to his original petition, he asserted a claim concerning evidence of prior bad conduct on his part. See Opening Brief on Remand (ECF No. 255), pp. 11–12. But that claim was completely different from Claim 1(II)(B). The claim on the appeal in Castillo's state habeas action was that his counsel was ineffective for failing to object to the manner in which the jury was instructed to consider such evidence. See Petition for Writ of Habeas Corpus (ECF No. 1 at 138–41). Claim 1(II)(B), on the other hand, is a claim that Castillo's trial counsel was ineffective for failing to object to the manner in which evidence was presented, that is, the testimony of witnesses Eylar and Ehlers. Those are different claims, based on different operative facts—the jury instructions regarding consideration of the evidence versus the manner of presentation of the evidence—and, therefore, Claim 1(II)(B) does not relate back. Ross does not affect this conclusion.

1 D. Claims 3(I)(B), 3(I)(C) and 3(II)(B)

2 In Claim 3(I)(B), Castillo claims that his federal constitutional rights were violated
3 because, in the guilt phase of his trial, the trial court failed to properly instruct the jury
4 regarding reasonable doubt. Second Amended Petition (ECF No. 126), pp. 118–20.

5 In Claim 3(I)(C), Castillo claims that his federal constitutional rights were violated
6 because, in the guilt phase of his trial, the trial court failed to properly instruct the jury
7 regarding malice aforethought, and appellate counsel was ineffective for failing to raise
8 this issue. *Id.* at 120–21. And, in Claim 3(II)(B), Castillo claims that his federal
9 constitutional rights were violated because, in the penalty phase of his trial, the trial
10 court failed to properly instruct the jury regarding reasonable doubt, and trial counsel
11 was ineffective for failing to raise this issue. *Id.* at 123.

12 In the March 2, 2016, order resolving Respondents' motion to dismiss, this Court
13 ruled that none of these three claims relate back to Castillo's original petition, because
14 they do not share a common core of operative fact with any claim asserted in the
15 original petition. See Order entered March 2, 2016 (ECF No. 184), pp. 17–19. In making
16 that determination, the Court considered the documents attached to Castillo's original
17 petition. See *id.* The Court's conclusion in this regard is not affected by *Ross*.

18 In his brief on remand, Castillo points to the following sentence in his opening
19 brief on the appeal in his state habeas action, which was attached to his original petition
20 in this case:

21 As the result of unconstitutional form jury instructions defining reasonable
22 doubt, express malice and premeditation and deliberation, first degree
23 murder convictions occur in the absence of proof beyond a reasonable
doubt, in the absence of any rational showing of premeditation and
deliberation, and as a result of the presumption of malice aforethought.

24 See Opening Brief on Remand (ECF No. 255), p. 12; Petition for Writ of Habeas Corpus
25 (ECF No. 1 at 154). However, this conclusory allegation was made in support of a claim
26 completely different from Claims 3(I)(B), 3(I)(C) and 3(II)(B): a claim that Nevada's
27 capital punishment system does not adequately narrow the class of murders for which
28 the death penalty may be imposed, and that, as a result, it functions in an arbitrary,

1 capricious and irrational manner. See Petition for Writ of Habeas Corpus (ECF No. 1 at
2 153–57). That conclusory allegation in Castillo’s brief before the Nevada Supreme Court
3 did not amount to a separate claim for the Nevada Supreme Court to adjudicate, or a
4 claim incorporated into Castillo’s original petition in this case.

5 Moreover, Castillo’s allegation, in passing, in his brief before the Nevada
6 Supreme Court, that certain jury instructions were unconstitutional, was completely
7 unsupported by any explanation or factual allegations. See Petition for Writ of Habeas
8 Corpus (ECF No. 1 at 154). Without any facts asserted in the appellate brief to support
9 that bald allegation, there are no operative facts for Claims 3(I)(B), 3(I)(C) and 3(II)(B) to
10 relate back to. Claims 3(I)(B), 3(I)(C) and 3(II)(B) do not relate back, and this conclusion
11 is unaffected by *Ross*.

12 E. Claims 4 and 5

13 In Claim 4, Castillo claims that his federal constitutional rights were violated
14 because the prosecutor’s non-statutory aggravating evidence included juvenile offenses
15 and juvenile misconduct, and trial and appellate counsel were ineffective for failing to
16 raise this issue. Second Amended Petition (ECF No. 126), pp. 125–41. In Claim 5,
17 Castillo claims that his federal constitutional right of confrontation and other
18 constitutional rights were violated, in the penalty phase of his trial, as a result of
19 prosecution’s presentation of his juvenile criminal records through witnesses other than
20 those who created the records, and trial counsel was ineffective for failing to raise this
21 issue. *Id.* at 141–54.

22 In the March 2, 2016, order resolving Respondents’ motion to dismiss, this Court
23 ruled that neither of these claims related back to Castillo’s original petition, because
24 they do not share a common core of operative fact with any claim asserted in the
25 original petition. See Order entered March 2, 2016 (ECF No. 184), pp. 19–20. In making
26 that determination, the Court considered the documents attached to Castillo’s original
27 petition. See *id.* The Court’s conclusion in this regard is not affected by *Ross*.

1 In his brief on remand, Castillo points out that, in its order affirming the denial of
2 his first state habeas petition, the Nevada Supreme Court discussed the evidence of his
3 juvenile criminal record. See Opening Brief on Remand (ECF No. 255), p. 13; Petition
4 for Writ of Habeas Corpus (ECF No. 1 at 7, 11, 13). However, that discussion of the
5 evidence of Castillo juvenile criminal record, in the Nevada Supreme Court's decision,
6 was in the context of claims completely unlike Claims 4 and 5, claims based on different
7 operative facts.

8 Castillo also points to his summary of the evidence introduced at the penalty
9 hearing, including the evidence regarding his juvenile criminal record, in his opening
10 brief on the appeal in his state habeas action, which was attached to his original
11 petition. See Opening Brief on Remand (ECF No. 255), pp. 13–14; Petition for Writ of
12 Habeas Corpus (ECF No. 1 at 115–18). However, the mere mention of that evidence in
13 that brief does not allow for relation back of Claims 4 and 5. As is discussed above,
14 Ross makes clear that, for relation back, facts found in documents attached to, and
15 incorporated into, an original petition must be related to a claim actually asserted in that
16 petition. See *Ross*, 950 F.3d at 1168 (“If an exhibit to the original petition includes facts
17 unrelated to the grounds for relief asserted in that petition, those facts were not
18 ‘attempted to be set out’ in that petition and cannot form a basis for relation back.”); see
19 also *id.* at 1167, 1172 n.17, 1173.

20 Castillo also notes that, in his brief before the Nevada Supreme Court, he
21 asserted a claim that his counsel was ineffective for failing to object to the manner in
22 which the jury was instructed to consider the prosecution’s evidence in the penalty
23 phase of the trial. See Opening Brief on Remand (ECF No. 255), pp. 13–14; Petition for
24 Writ of Habeas Corpus (ECF No. 1 at 138–41). That, though, is a different kind of claim
25 from Claims 4 and 5, and it was based on far different operative facts.

26 Claims 4 and 5 do not relate back. Ross does not affect the Court’s conclusion in
27 this regard.

1 F. Claim 17

2 In Claim 17, Castillo claims that his federal constitutional rights were violated
3 because executing a mentally ill, cognitively distressed individual constitutes cruel and
4 unusual punishment. Second Amended Petition (ECF No. 126), pp. 217–24.

5 In the March 2, 2016, order resolving Respondents' motion to dismiss, this Court
6 ruled that this claim does not relate back to Castillo's original petition, because “[n]o
7 claim with the same core of operative facts as this claim was raised in Castillo's briefing
8 on his direct appeal or in his briefing on the appeal in his first state habeas action, which
9 briefing was incorporated into his original petition in this action.” Order entered March 2,
10 2016 (ECF No. 184), p. 25. The Court's conclusion in this regard is not affected by
11 Ross.

12 Castillo argues that Claim 17 relates back to his original petition because he
13 incorporated into that petition his opening brief on his direct appeal, in which he argued
14 that “death penalty statutes must be structured to prevent the penalty being imposed in
15 an arbitrary and unpredictable fashion.” See Opening Brief on Remand (ECF No. 255),
16 p. 15; Petition for Writ of Habeas Corpus (ECF No. 1 at 67). But that argument was
17 made in the context of a claim that it was error for the trial court to give an “anti-
18 sympathy” instruction to the jury, a claim unlike Claim 17 and based on different
19 operative facts.

20 Next, Castillo points out that in his opening brief on the appeal from the denial of
21 relief in his state habeas action, which was attached to his original petition, he argued
22 that “the Nevada capital punishment system operates in an arbitrary and capricious
23 manner,” and that “Nevada law fails to provide sentencing bodies with any rational
24 method for separating those few cases that warrant the imposition of the ultimate
25 punishment [from] the many that do not.” See Opening Brief on Remand (ECF No. 255),
26 p. 15; Petition for Writ of Habeas Corpus (ECF No. 1 at 153–55). Castillo also points to
27 the Nevada Supreme Court's decision rejecting that argument. See Opening Brief on
28

1 Remand (ECF No. 255), p. 15; Petition for Writ of Habeas Corpus (ECF No. 1 at 153–
2 55). That claim, too, is unlike Claim 17 and based on different operative facts.

3 Castillo goes on to point out that in the documents attached to his original
4 petition, there were many references to his alleged mental illness. See Opening Brief on
5 Remand (ECF No. 255), p. 15. The Court recognizes this, but, here again, those factual
6 allegations are not related to any claim asserted in the original petition and based on
7 operative facts in common with Claim 17. See *Ross*, 950 F.3d at 1167–68, 1172 n.17,
8 1173.

9 Claim 17 does not relate back. The Court’s conclusion here is unaffected by
10 *Ross*.

11 G. Claim 19

12 In Claim 19 of his second amended petition, Castillo claims that his federal
13 constitutional rights were violated because of the cumulative errors in his trial, appellate,
14 and state post-conviction proceedings. Second Amended Petition (ECF No. 126),
15 p. 228. With respect to this claim, in the March 2, 2016, order resolving Respondents'
16 motion to dismiss, this Court ruled: “Castillo’s cumulative error claim incorporates
17 all his other claims; it relates back to his original petition, and is timely, to the extent that
18 his other claims relate back and are timely.” Order entered March 2, 2016 (ECF No.
19 184), p. 25. The Court’s conclusion regarding this claim remains unchanged after *Ross*.

20 H. Procedural Default

21 Finally, Castillo requests the Court to reconsider its rulings regarding the
22 procedural default of Claims 1(II)(A), 1(II)(B), 3(I)(C), 3(II)(B), 4 and 5. See Opening
23 Brief on Remand (ECF No. 255), pp. 17–21. That issue, though, was not part of the
24 court of appeals’ limited remand, so the Court declines to revisit it. See Order of Court
25 of Appeals filed January 13, 2021 (ECF No. 251).

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1 || III. Conclusion

2 **IT IS THEREFORE ORDERED** that the Court declines to reconsider its rulings
3 that Claims 1(II)(A), 1(II)(B), 3(I)(B), 3(I)(C), 3(II)(B), 4, 5, 17 and 19 of the second
4 amended petition do not relate back to the original petition for purposes of application of
5 the statute of limitations, and that Claims 1(II)(A), 1(II)(B), 3(I)(C), 3(II)(B), 4 and 5 are
6 barred under the procedural default doctrine. This order constitutes the final ruling of
7 this Court on the limited remand of this case from the Ninth Circuit Court of Appeals.

8 **IT IS FURTHER ORDERED** that the Clerk of the Court is directed to transmit a
9 copy of this order to the Ninth Circuit Court of Appeals.

10 **IT IS FURTHER ORDERED** that the Clerk of the Court is directed to
11 administratively close this case.

12 DATED THIS 20th of September, 2022.


ROBERT C. JONES
UNITED STATES DISTRICT JUDGE